

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
SAM BIRD, JUDGE

DIVISION I

CACR07-1070

MARCH 19, 2008

FREDDIE L. HOGAN	APPELLANT	APPEAL FROM THE LONOKE COUNTY CIRCUIT COURT [NO. CR-2005-164, CR-2005-165]
V.		HON. PHILLIP T. WHITEAKER, JUDGE
STATE OF ARKANSAS	APPELLEE	AFFIRMED

Freddie L. Hogan appeals the revocation of his probation, challenging the sufficiency of the evidence. We hold that the evidence was sufficient to support the trial court's findings that appellant violated conditions of his probation, and we affirm the revocation.

On December 13, 2005, the trial court accepted Hogan's guilty plea to two counts of felony nonsupport. Hogan was sentenced to concurrent terms of six and ten years' supervised probation for the respective crimes, was assessed fines and fees totaling \$1150, and was ordered to make monthly payments of \$25 for probation fees and \$420 toward his total child-support arrearage of \$24,432.13.

In March 2007 the State filed a petition to revoke probation, alleging that Hogan had violated conditions of the probation by 1) committing the offense of non-payment of support after being placed on probation for the same type of offense, 2) testing positive for cocaine and

opiates, 3) failing to maintain gainful employment, 4) lying to a probation officer regarding recent drug use, and 5) failing to pay probation fees, restitution, court costs, and fines. At the conclusion of a revocation hearing, conducted on July 31, 2007, the trial court found Hogan guilty of violating his probation. He was sentenced to concurrent sentences of six years' imprisonment in the Arkansas Department of Correction for each felony.

Officer Kevin Trigg testified at the hearing that he took over Hogan's supervision in January 2007 after the previous probation officer left. Trigg stated that he contacted Hogan, got him into the office, and set up a reporting schedule for him. According to Trigg's testimony, the following violations of conditions occurred. Hogan did not pay any of the required child support, he denied any drug use before and after providing a urine sample that produced positive results for cocaine, and he eventually confessed that he had used cocaine. Furthermore, at the time of the filing of the revocation petition, Hogan had not obtained employment, had paid none of his court-ordered child support, still owed over \$20,000 in restitution, and owed three months' probation fees totaling \$75.

Officer Trigg also testified that Hogan reported to him as required from January to June 2007 but "missed the last three appointments" before the hearing without telephoning or giving any excuse. Trigg explained that Hogan missed June 11 and 18, he came in on June 25 to say that he could not report on Mondays because he had obtained a new job,¹ and Trigg told him just to make sure that he was reporting for his court appointments. Trigg testified that in February or March, when he had talked to Hogan about his failure to acquire gainful

¹ June 11, 18, and 25 were Mondays.

employment, Hogan said that he had applied for social security disability and could not work because of a medical problem, but that he provided no documentation showing any approval for disability. Trigg concluded that Hogan “was grossly in violation of his probation conditions” because he owed a large amount of child support, had failed to make any payments for over a year, and had tested positive for substance abuse.

Under cross and re-direct examination, Trigg testified that Hogan said he had not made a good-faith effort to pay any of his child support. Trigg said that he had not verified that Hogan made no payments after the petition was filed. Trigg said that a payment record from the Office of Child Support Enforcement, although not showing a total arrearage, did show various payments in 2006 and 2007 totaling \$760 in the time since Hogan had been placed on probation. Trigg said that he did not know what Hogan’s required monthly payments were and had no record of whether his current child support was delinquent.

At the conclusion of Trigg’s testimony, Hogan moved for dismissal on the basis that the State had failed to prove that he had violated the terms of his probation. He argued that he had missed only a couple of meetings after finding full-time employment and being unable to report on Mondays, that he had been trying to get social security disability, and that he had been under a doctor’s care. The court denied the motion.

Hogan testified that child-support payments had been taken out of his paychecks before he suffered a shoulder dislocation as well as ligament, muscle, and rotator-cuff injuries, after which child support was taken out of his workers’ compensation. He said that he had petitioned the court for an order to reduce child support in 2004 because he was unable to find steady employment after being off work for a year and a half. He stated that he had

immediately applied for social security disability after his work injury and had received a denial of the disability shortly before the time of the revocation hearing. He said that he had been under a doctor's care continuously after his injury, for which he was assigned restrictions on lifting, climbing, bending, and reaching. He said that he had recently applied to Dillard's, Inc., and had obtained full-time employment of forty hours a week. Documents introduced as exhibits during Hogan's testimony were the trial court's March 25, 2004 order on review hearing; notice of the unfavorable social-security determination; and a Dillard's statement of earnings for the pay period July 15–21, 2007. The report of a vocational expert, as contained in the social-security determination, stated that Hogan was not capable of performing any of his past work (the report states that he had been a plasterer) but was capable of performing light exertional work.

Hogan testified that he would be able to make his required payments of \$52 a week for child support and \$220 a month for restitution, and he stated that he understood his responsibility to make the payments until a wage assignment was placed on his employer. He testified he had not paid all of his probation fees when he was not working and did not have the money to pay them. He testified that he had used cocaine "years ago" but not since he had been on probation, and he said that the positive cocaine test to which Officer Trigg had referred might be attributed to unidentified medications that he had been taking.

Sufficiency of the Evidence to Support the Revocation

The State need only show that the appellant committed one violation in order to sustain a revocation. *Phillips v. State*, ___ Ark. App. ___, ___ S.W.3d ___ (Jan. 23, 2008). In order to revoke probation, the trial court must find by a preponderance of the evidence

that the defendant inexcusably violated a condition of that probation. Ark. Code Ann. § 5-4-309(d) (Repl. 2006); *Harris v. State*, 98 Ark. App. 264, ___ S.W.3d ___ (2007). Where the alleged violation is a failure to make payments as ordered, the State has the burden of proving by a preponderance of the evidence that the failure to pay was inexcusable; once the State has introduced evidence of non-payment, the burden shifts to the defendant to offer some reasonable excuse for his failure to pay. *Reese v. State*, 26 Ark. App. 42, 759 S.W.2d 576 (1988).

Hogan contends that the State failed to prove that he violated the terms of his probation. He points to his denial of the hearsay testimony that he had used cocaine; he points out that he attended all probation meetings until he obtained full-time employment and was unable to do so; and he notes that his probation officer did not have complete records regarding arrearages, past payments, and delinquency of current support. Hogan also contends that he proved that he did not inexcusably fail to pay his restitution or current support payments. He relies upon his testimony that his delinquent child-support payments resulted from being off work for a year after injuring his shoulder.

The trial court's findings will be upheld on appeal unless they are clearly against the preponderance of the evidence; because a determination of a preponderance of the evidence turns on questions of credibility and weight to be given to the testimony, we defer to the trial judge's superior position. *Jones v. State*, 355 Ark. 630, 144 S.W.3d 254 (2004). The Arkansas Rules of Evidence, including the rules regarding hearsay, do not apply in revocation hearings. *Jones v. State*, 31 Ark. App. 23, 786 S.W.2d 851 (1990).

Here, Hogan denied using cocaine after being put on probation, but his probation officer testified that Hogan produced a positive test for cocaine and admitted its use after initially denying it. The conflicting testimony as to whether Hogan admitted using cocaine after being put on probation was a matter for the trial court to resolve. We hold that the officer's testimony regarding the positive test and Hogan's admission to using cocaine while on probation constitutes sufficient evidence to support a finding that Hogan violated conditions of his probation by using cocaine.

Affirmed.

PITTMAN, C.J., and GRIFFEN, J., agree.